Supreme Court of the United States

OCTOBER TERM, 1943.

No. 52.

WILLIAM J. DEMOREST, JR., ANN DEMOREST and CAROLYN DEMOREST by GERALD P. CULKIN, their Special Guardian,

Appellants,

AGAINST

CITY BANK FARMERS TRUST COMPANY, as Trustee under the Will of HENRY C. WEST, Deceased, *et al.*

APPEAL FROM THE SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK.

Brief of Special Guardian for Infant Appellants.

FRANCIS J. MAHONEY,
Counsel for the Appellants.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

TABLE OF CASES, TEXT BOOKS AND STATUTES CITED.

Cases.

Text Books.

Statute.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 52.

WILLIAM J. DEMOREST, JR., ANN DEMOREST and CAROLYN DEMOREST by GERALD P. CULKIN, their Special Guardian,
Appellants,

vs.

CITY BANK-FARMERS TRUST COMPANY, as Trustee under the Will of HENRY C. WEST, Deceased, *et al.*

Brief of Special Guardian for Infant Appellants.

Reference to Official Reports of Opinions.

Opinion of Surrogate James A. Foley, 175 Misc. 1044;
Majority opinion of Court of Appeals, 289 N. Y. 426;
Dissenting opinions of Court of Appeals, 289 N. Y. 432, *et seq.*

Statement of Grounds on Which Jurisdiction of This Court Is Invoked.

This appeal is from an order of the Court of Appeals of the State of New York, dated the 15th day of January, 1943, and filed on remittitur in the office of the Clerk of the Surrogate's Court, New York County, on January 25th, 1943, which affirmed an order of the Appellate Divi-

sion, First Department, which in turn had affirmed a decree of the Surrogate's Court, New York County, judicially settling the intermediate account of proceedings of the trustee above named, and directing distribution of income from salvage operations. The special guardian-appellant appeals from the order insofar as it holds that Section 17c, Subdivision 2 of the Personal Property Law of the State of New York whose provisions apply to estates of persons who predeceased the enactment of the statute and whose estates were in the process of administration prior to the enactment of the law, is constitutional (R. 87). Appellant contends that said Subdivision 2 of said statute violates the Fourteenth Amendment of the Constitution of the United States of America, because it is retroactive and deprives appellants of property without due process of law and deprives appellants of rights guaranteed to them by said Fourteenth Amendment.

Statement of Case.

The above-named deceased, died on the 1st day of May, 1934, a resident of the County and State of New York. His will, dated December 14th, 1928, was admitted to probate by the Surrogate's Court, New York County on May 28th, 1934 (R. 26). In and by his Last Will and Testament (R. 90), he created a primary trust of his residuary estate for the benefit of his wife, Emma M. West, for her life or until she should remarry, certain secondary life estates, and directed the disposition thereafter to designated remaindermen. The wards of the Special Guardian are interested in the remainder (R. 91).

The executor qualified as trustee and as such received as part of the property constituting said trust, nine certain parcels of real property, which had been acquired by

the trustee while it was executor. The acquisition of these properties was through foreclosure or deed in lieu of foreclosure of mortgages which had constituted part of the original estate of the decedent (R. 31 and 32). It is unnecessary to enumerate the street addresses or to otherwise described these parcels (they are described by street address at R. 31 and 32) except to say that all the properties were improved and that two of the parcels, to wit: 168 Morrison Avenue, West New Brighton, Staten Island and 41 Montrose Avenue, Brooklyn, were resold by the trustee prior to the enactment of Section 17c of the Personal Property Law and that the other seven parcels are still held by the trustee and are the subjects of continuing salvage operations. Insofar as the parcels sold by the trustee prior to the enactment of the statute are concerned, the special guardian-appellant has no complaint with that portion of the decree affirmed which holds that the statute does not apply (R. 26). It was and is his contention that the Surrogate, the Appellate Division and the Court of Appeals correctly held that the salvage operations with respect to these parcels were completed, that the entry of a decree was not necessary to the completion of salvage operations and that these parcels and the profits thereof remained unaffected by the provisions of the statute and are subject to the law as it existed prior thereto.

The subdivision of the statute involved, to wit, Section 17c, Subdivision (2), Personal Property Law, as enacted, effective April 13, 1940, reads as follows:

> "2. The existing rules of procedure applying to salvage operations respecting existing mortgage investments are continued except as modified by the subparagraphs hereinafter set forth. The terms and rules of procedure of this subdivision shall

apply specifically (a) to the estates of persons dying before its enactment and (b) to mortgages on real property held by a trustee under a deed of trust or other instrument executed before the date of its enactment and (c) to real property acquired by foreclosure of mortgage or real property acquired in lieu of foreclosure before or after the date of its enactment, in trusts created or mortgage investments made prior thereto, and (d) to any pending proceeding or action for an accounting of the transactions of an executor or trustee.

(a) Net income during the salvage operation up to three per centum per annum upon the principal amount of the mortgage shall be paid to the life tenant, regardless of principal advances for the expenses of foreclosure or of conveyance in lieu of foreclosure and arrears of taxes and other liens which occurred prior to such foreclosure or conveyance and the cost of all capital improvements. Any payment of net income heretofore or hereafter made to the life tenant up to such three per centum per annum shall be final and shall be not subject to recoupment from the life tenant or as a surcharge against the trustee or executor. The amount of all such payments shall be taken into account, however, in the apportionment of the proceeds of sale and shall be charged against the share of the life tenant.

(b) The foregoing principal advances shall be repaid out of excess net income above such three per centum per annum. When principal advances have been satisfied, any excess income shall be impounded (subject to reinvestment under the term

of the will or deed) to await sale and apportionment.

(c) The unpaid principal advances shall be a primary lien upon the proceeds of sale and shall be paid first out of any cash so derived. If insufficient the balance shall be a primary lien upon any purchase money mortgage received upon the sale.

(d) The purpose of the enactment of this subdivision is declared to be the simplification of the rules of procedure in mortgage salvage operations and the elimination of present complications which work to the disadvantage of the life tenant, who is usually the principal object of the testator's or settlor's bounty, by depriving him of a fixed right to the actual payment of any net income earned by the property. Such fixed right is granted in lieu of the discretion now given to the trustee to pay net income or any part thereof to the life tenant. The general rules of the apportionment of the proceeds of sale between life tenant and remainderman are retained subject to the express modifications made herein. Only equitable adjustments and balances as between the parties are intended to be effectuated by the provisions of this subdivision. If any provision of this subdivision or the application thereof to any mortgage or acquired property by foreclosure or conveyance, or to any trust is held invalid, the remainder of the subdivision and the application of such provision to any other mortgage or property acquired by foreclosure or conveyance or other trust shall not be affected thereby."

Specification of Assigned Error Intended to Be Urged.

The Court of Appeals erred in holding:

1. That 17c of the Personal Property Law of the State of New York (Chap. 452 of the Laws of New York 1940) as applied to the trust created under the Will of Henry C. West and to its administration, was not repugnant to the Fourteenth Amendment of the Constitution of the United States.

2. That said statute and its application, by the decree appealed from, to the Estate of Henry C. West, did not deprive appellants of property and of vested rights without due process of law.

POINT I.

Subdivision 2 of Section 17-c of the Personal Property Law of the State of New York is unconstitutional because it is retrospective and deprives the remaindermen of vested rights without due process of law.

At the outset, this appellant desires to make it clear that he is not unsympathetic with the purpose actuating the sponsors of the legislation and that he is not unmindful of the fact that situations have developed and are presently continuing with respect to salvage operations which merit some consideration on behalf of life tenants in many instances. The complaint of this appellant is not with subdivision 1 which applies only to the estates of persons dying or trusts created after the effective date of the statute, but with the method pursued in the attempt to accomplish relief retroactively, and his sympathy cannot permit him to overlook the violation of constitutional

rights which results from the enactment and application of subdivision 2 of this section.

Subdivision "2" of the statute provides that the "terms and rules of this subdivision shall apply specifically (a) to the estates of persons dying before its enactment and (b) to mortgages on real property held by a trustee under a deed of trust or other instrument executed before the date of its enactment and (c) to real property acquired by foreclosure of mortgage or real propety acquired in lieu of foreclosure of mortgage before or after the date of its enactment in trusts created or mortgage investments made prior thereto, and (d) to any pending proceeding or action for an accounting of the transactions of an executor or trustee."

Subdivision "2(a)" directs the immediate payment to the life tenant out of net income from the realty at the rate of 3% per annum of the face amount of the mortgage beginning with the date of the acquisition of the real property by the trustee and continuing to the resale of the formerly mortgaged property, regardless of advances made from principal for expenses of foreclosure or of a conveyance in lieu of foreclosure, and regardless of the costs of capital improvements. This subsection further provides that any such payments shall be final and not subject to recoupment from the life tenant and shall be taken into account only in the apportionment of the proceeds of sale and charged against the share of the life tenant.

The purpose of the legislation, as explained in Subdivision "2(d)" thereof, is to simplify procedure in salvage operations, and to remove disadvantage to life tenants under the discretionary power given to the trustee under the Chapal-Otis Rules (*Matter of Chapal*, 269 N. Y. 464 and *Matter of Otis*, 276 N. Y. 101; 277 N. Y. 659) to disburse income to the life tenant, after advances made

from principal as an incident to the acquisition of the property have been repaid. Concededly the trustee had such power before the enactment of Section 17-c, subject to accounting and subject to recoupment in the event of inequitable allocation. This subdivision states also that "the life tenant is usually the principal object of the testator's or settlor's bounty" and that under the Chapal-Otis rules, the beneficiary intended to be most favored was thus deprived of income during the salvage period. Subsection 2(b) provides that the surplus income above said 3% shall be applied to the advances made from principal, for arrears of taxes, other liens and the acquisition and the management of the property, until all of such advances have been satisfied.

Subdivision 2 is expressly retroactive and no party to this appeal will attempt to dispute this fact. Its express purpose is to affect acts which occurred and such rights as may have accrued by application of the Chapal-Otis rules prior to April 13, 1940, the effective date of the statute.

Concededly all the parcels of real estate involved in the case at bar were acquired by the trustee through foreclosure or deed in lieu of foreclosure prior to the enactment of the statute and the seven unsold parcels were, prior to the statute, and still are, subjects of salvage operations.

Certain observations inescapably present themselves to the mind of this appellant. The first is the ease with which the statute subordinates the remainderman to the life tenant; and the second, that the legislature has interpreted the intent of each and every testator who died prior to the enactment of the statute, and whose estate contained a salvage operation.

By the law of the State of New York, fixed by determination of its highest court prior to the enactment of

the disputed section, proceeds from transactions of fiduciaries in salvage operations affected the rights of remaindermen and life tenants because the mortgages were "security not for principal alone but for income as well" (*Matter of Chapal*, 269 N. Y. 464, 472). Therefore, as stated by Lewis, *J.* in one of the dissenting opinions of the Court of Appeals (R. 124 to 126):

> "When the properties here involved came into the hands of the trustee, the rule of apportionment last quoted above was not a matter of grace as the majority opinion herein [fol. 258] seems to hold. It was a rule of property the essential principle of which had long been recognized and applied in this jurisdiction and others, including England. (*Meldon* v. *Devlin*, 31 App. Div. 146; affd., 167 N. Y. 573 [1901]; *Parsons* v. *Winslow*, 16 Mass. 361, 365 [1820]; *Veazie* v. *Forsaith*, 76 Me. 172 [1884]; *Hagan* v. *Platt*, 48 N. J. Eq. 206, 207, 208 [1891]; *Greene* v. *Greene*, 19 R. I. 619, 621-624 [1896]; *Quinn* v. *First Nat. Bank*, 168 Tenn. 30 [1934]; *Matter of Nirdlinger*, 327 Penn. St. 171, 172, 173 [1937]; *Cox* v. *Cox*, L. R. 8 Eq. 343, 344, 345 [1869]; *Matter of Moore*, 54 L. J. Ch. 432 [1885], and see *Matter of Marshall*, 43 Misc. Rep. 238, 245 [1904].) A classical statement of the underlying principle which runs through the cases cited above was made in *Cox* v. *Cox*, *supra*, page 344 as follows: 'The true principle *in all these cases is*, that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more *damage* in proportion to *his estate and interest* than the other suffers—from the default of the obligor.' (Emphasis supplied.) This was orthodox doctrine long before the decisions by this

court in the *Meldon*, *Chapal* and *Otis* cases, *supra*. In accord with that rule of property there had vested in the income beneficiary and the remaindermen respectively, prior to the effective date of section 17-c, subdivision 2, a proprietary interest in each of the properties acquired by the trustee. (*Matter of McManus, supra*, p. 426.)

Although the basis adopted by the courts for computing the item of interest involved differs in the various jurisdictions which have considered the question, there is a basic principle, as we have seen, which runs throughout the decisions cited above—*viz.*, that, in the proceeds from salvage operations incidental to the administration of a trust estate, both life tenant and remainderman have a proprietary interest and both are entitled to be paid their proportionate shares thereof.

A marked difference should be noted between the provisions of section 17-c, subdivision 2, with which we are here concerned, and subdivision 1 of the same section. Unlike subdivision 2, the Legislature was careful in subdivision 1 to make its mandates in effect prospective—not retroactive. It also employed language by which its mandates would in no event conflict with any contrary intention which might be expressed by the creator of the trust.

[fol. 259] The resultant effect of section 17-c, subdivision 2, is to transfer, without the right of recoupment, from the principal account of a trust to the income account, an amount—fixed arbitrarily and without regard to the demands of justice and equity in the circumstances at three per cent. per annum computed upon the principal amount of each salvaged mortgage. Such a mandatory transfer to the life tenant of property rights which had become

vested in the remaindermen under a rule of property which antedated the exactment of section 17-c, subdivision 2, transcends the Legislature's power. 'Legislation which impairs the value of a vested estate is unconstitutional.' (*Matter of Pell*, 171 N. Y. 48, 52, 53; *People* v. *O'Brien*, 111 N. Y. 1, 57-59; *Westervelt* v. *Gregg*, 12 N. Y. 202, 212.) As I view the statute it authorizes, without due process of law, the taking of property rights which became vested in the remaindermen under an established rule of property prior to the effective date of the statute. To that extent it violates the Fourteenth amendment to the Federal Constitution and article 1, section 6, of the Constitution of the State of New York."

How can the legislature say that where the testator created a trust, without expressly stating a priority between life tenant and remaindermen and where there has been no adjudication of intent, the primary and superior object of the testator's bounty usually was and therefore will be presumed to have been in every instance, the life beneficiary? Surely, it must be admitted that in many instances, the testamentary provision for a life tenant is more of a token or the fulfillment of a moral obligation, the primary concern of the testator being the remainderman. In fact the tendency to preserve estates was the reason for the statutes against suspensions. Many life estates are created as a minimum compliance with Section 18 of the Decedent Estate Law which requires that a surviving spouse receive not less than a stated minimum share. In the will involved in this estate, the testator believed his obligation to the life tenant to exist only so long as she does not remarry. The life tenant in many instances is unquestionably secondary. The stat-

ute summarily adjudicates the intent of every testator without any process of law and without any adjudication in the particular instance. "No will has a twin brother." This appellant is willing to make the concession, that there would be process of law, if the statute provided for protection to the life tenant, equitably distributed with protection to remaindermen, in any case where the Court of original jurisdiction shall first properly adjudicate that the life tenant was the primary object of the testator's bounty and that such protection to the life tenant was the intent of testator. This statute makes no provision for any adjudication by a court but presumes to retrospectively adjudicate generally and take unto the legislature this power of the judicial branch of the government (Story, Equity Jurisprudence 2nd Ed. Vol. 1, Sec. 489, *et seq.*). Lewis, *J.*, in his dissenting opinion develops this point as follows:

> "Subdivision 2 of the statute attempts to override all this by saying that in every case the life tenant must at all events immediately and finally receive net income at a rate arbitrarily fixed by the statute at three per cent.—no matter what may be the cross-equities of the parties and without regard for the business risks of the particular salvage operations. To this extent, subdivision 2 of the statute makes it mandatory that the court shall adjudicate every 'pending proceeding, or action for an accounting' without affording the parties any opportunity to be heard. The draftsmen of the statute apparently recognized some difficulty on that score, for the statute says: 'Only *equitable* adjustments and balances, *as between the parties* are intended to be effectuated by the provisions of this subdivision' [2]. (Emphasis supplied.) We

have, then, this extraordinary situation: While subdivision 2 of the statute has not changed the law that pending questions of apportionment are to be decided upon equitable principles, yet it declares that such principles must be applied by the courts, not according to the judicial judgment of what is equitable in the circumstances of a pending controversy, but according to a legislative mandate rigidly enjoined for all pending cases.

[fol. 260] The Legislature has no power so to declare the law 'for the information and government of the courts in the decision of causes before them.' (Kent, *Ch. J.*, in *Dash* v. *Van Kleeck*, 7 Johns. 477, 508, 509.) In this connection it should be observed that subdivision 2 of the statute is not emergency legislation; it invokes neither the general welfare nor any other consideration of public policy. In the only opinion written below, it is said: 'The Legislature has done no more in formulating a modification of existing rules than the courts themselves could do. * * *.' (175 Misc. 1044, at p. 1050.) Such a proposition is not free from risk. Nobody knows what economic chaos may follow the present war. I am not prepared to say that as to all pending cases the Legislature may do at one stroke whatever courts of justice may do in accord with their tradition to proceed only in a particular controversy and only after taking evidence at a hearing held upon issues defined by pleadings. The Legislature can no more exercise judicial power than our courts can exercise legislative power. (See opinion by Ruffin, *C. J.* in *Hoke* v. *Henderson*, 25 Amer. Dec. p. 686 [N. C.].) The determination of rights of property *inter partes* is always a judicial question. As I view it, sub-

division 2 of section 17-c of the Personal Property Law is a void attempt by the Legislature to make such a determination."

As stated by the Court of Appeals in *Morris* v. *Sickly*, 133 N. Y. 456, on the determination of testamentary intent:

> "The intention and purpose must be found to exist at the time of the execution of the will, and cannot be varied or changed by any after-occurring events."

Under New York Law, the only intention which may be attributed to a testator is that which results from the natural implications of the words employed in the will when viewed in the light of the circumstances surrounding him. *Matter of Rowland*, 273 N. Y. 100 and cases cited.

It is a well established canon of statutory construction, that a retrospective law may not validly impair vested rights. A retrospective law is

> "• • • a law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past; must be deemed retrospective." (Black's Law Dictionary, 3rd Edition, adopting the definition of Justice Story in *Society of Propagation* v. *Wheeler*, 22 F. Cas. No. 13,156; *Sturges* v. *Carter*, 114 U. S. 511, 519.)

"A retrospective law relates back to and gives to a previous transaction, some different legal effect from that which it had under the law when it occurred", *Corpus Juris*, Vol. 12, Sect. 778, *Chicago, etc.* v. *State*, 47 Nebr. 549; *Clarke Inst. Co.* v. *Wadden*, 34 S. D. 550.

Only on the theory of police power and in the face of public emergency may a retrospective law, such as the one under discussion, be passed.

In the case at bar no paramount interest of the people is at stake nor is there any question involving public health, welfare or morals. * * * As said by Lehman, *J.* (now Chief Judge), in *Matter of People, etc.* (*Title & Mortgage Guarantee Co.*), 264 N. Y. 69, 84:

"The decisions of the United States Supreme Court do certainly establish these criteria: Legislation which impairs the obligations of a contract or otherwise deprives a person of his property can be sustained only when enacted for the promotion of the general good of the public, the protection of the lives, health, morals, comfort and general welfare of the people and when the means adopted to secure the end are reasonable."

The contention that laws must be tested according to the social and economic conditions existing at the time of their enactment, cannot constitute ground for a retroactive adjudication of intent by the legislature and to excuse an adjudication as to intent of the testator by the judicial branch of the government wherein that right and duty are reposed.

"Vested rights cannot be affected by subsequent legislation." *Lytle* v. *Beveridge*, 58 N. Y. 592, 602;

American Smelting Co. v. *Colorado*, 204 U. S. 103; *McCullough* v. *Com.*, 172 U. S. 102.

See also, *Hathhorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326; *In re Pell*, 171 N. Y. 48; *People* v. *Powers*, 147 N. Y. 104, 109; *N. Y., etc., R. R. Co.* v. *Van Horn*, 57 N. Y. 473; *Ryder* v. *Hulse*, 24 N. Y. 372; *Westervelt* v. *Gregg*, 12 N. Y. 202.

> "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest." *12 Cor. Jur.*, 485; Cooley on Constitutional Law, page 351; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646, 673.

Due process of law is defined as

> "• • • an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his right."

See *City of Buffalo* v. *Newbeck*, 209 App. Div. 386.

The "due process" clause of the Federal Constitution should be construed in the light of pre-existing law. *16 Cor. Jur.*, Section 568 (d), page 1149. The applicable law existing prior to the enactment of Section 17-c Personal Property Law has already been discussed herein.

Obviously on April 12th, 1940, one day prior to the effective date of the statute, *Matter of Otis* and *Matter of Chapal*, *supra*, expressed the New York law on the question of allocation of income in salvage operations. In any estate involving a salvage operation settled by decree made prior to said date, the rights of principal and in-

come would have been determined in compliance with the law as fixed by said cases. A decree would and could have been entered only because rights existed. But according to Section 17c, if the salvage operation continued for two days longer, those rights became non-existent. In the case at bar, if Section 17c is applicable, the remaindermen are to receive different considerations because the trustee settled its intermediate account subsequent and not prior to the effective date of the statute. This does not seem to make sense or to possess the positiveness of law.

Section 17c of the Personal Property Law presumes to substitute a different measure of equity and to create rights in lieu or in destruction of rights previously existing. It overlooks the definition that a salvage operation is a "joint salvage venture" (*Matter of Chapal, supra, Matter of Otis, supra*) and the legislature invades a province which is not its own.

The rights and obligations of joint venturers are fixed in law, those rights having been defined by the judicial branch of the government with which rests the privilege of definition. The legislature, however, in enacting Section 17c aforesaid, disregards the definition of the courts and arbitrarily revokes the rights of one joint venturer and retroactively determines the rights of another joint venturer to be at least 3% of the face amount of the mortgage previously affecting the property payable out of net income, regardless of the amount of the principal, regardless of the value of the property acquired, regardless of the costs of acquisition, regardless of the expenses for the removal of liens and regardless of the expense of renovation and repair.

In *Matter of Otis*, and *Matter of Chapal, supra*, the Court expressly states that a mortgage taken by a trustee constitutes security for principal as well as income. The

Chapal opinion reviews some of the earlier authorities and states that the rule declared in the Chapal opinion amounts to a restatement of a well established rule of property in the administration of estates and trusts.

As late as *Matter of McManus*, 282 N. Y. 420, the Court of Appeals stated unanimously that accrued income must be ratably distributed between the principal trust and the estate of a life tenant who died before the completion of the salvage operation. If the estate of the life beneficiary has a vested although unrealized right to income, principal has at least an equal right to preservation for the benefit of the remaindermen, which fact the legislature apparently overlooked in its desire to provide only for the rights of the life tenant, even to the deprivation of the trust principal. The legislature has no power to deprive an individual of private property without his consent and give it to another. As stated by the Court of Appeals in *New York & Oswego R. R.* v. *Van Horn*, 57 N. Y. 473, 477:

> "• • • This no act of the legislature can do. It can never take the private property of one individual without his consent, and give it to another. (Citing cases.)
>
> "Such an act comes in direct conflict with the constitutional provision that 'no person shall be deprived of life, liberty or property, without due process of law'."

As determined in *Matter of McManus, supra*, there appears to be no question that under the law of New York the rights of principal in the proceeds of salvage operations constitute property just as much as do the rights of income. That the rights of the remaindermen in the case at bar are property rights with constitutional

protection, see *Matter of Pell*, 171 N. Y. 48, 53; *Matter of Lansing*, 182 N. Y. 238; *Westervelt* v. *Gregg*, 12 N. Y. 202, 212. In the last mentioned case, the concurring opinion says:

> "* * * No power in the State can legally confer upon one person or class of persons, the property of another person or class without their consent whatever motives or policy may exist in favor of such person."

In *Matter of Pell* the Court of Appeals said:

> "A right of succession passed to the four living children of George at the death of testator. It came from him, it was transferred by him, taking effect at his death; and passed then or never. But the right itself, although vesting in the successors at once, had its own peculiar character. It could not ripen into possession or enjoyment until the death of the life tenants, and before that event was contingent solely as to the person who should eventually take and the proportions to be observed. The legatees as a class were certain; the particular individuals alone uncertain. * * * To say that no beneficial interest passed into the hands where it was taxable is very different from saying that no beneficial interest passed at all. The doctrine of the case (*Matter of Curtis*, 142 N. Y. 219) and its manifest trend was that where the particular persons who were to have the beneficial possession were uncertain, the appraisal and collection must be adjourned until the uncertainty ended, but no new doctrine of the passing of the right of succession at a date later than that of the will was at all

asserted. It is said, however, that the right of succession passing in remainder by the will was at best merely technical and nominal, and that the beneficial interest did not pass until the termination of the life estate. In one sense that is true. The right of succession to specific individuals might prove barren, and for that reason the claim of the state should be adjourned, and the law of 1892 fully recognizes and provides for such an adjournment, but a necessary and admissible delay in appraisal and collect is a very different matter from an assertion that no beneficial right of succession passed at all until after the decease of the life tenants."

Even a contingent remainder constitutes a right of property which may not be impaired or destroyed by a statute passed after its creation. *Aetna Life Insurance Company* v. *Hoppin*, 214 Fed. 928.

We quote as follows from *Matter of Lansing*, 182 N. Y. 238, 243:

> "Mrs. McVickar was born before her grandfather died, and upon his death she took a vested interest in remainder * * *"

It is argued by the sponsors of the objectionable statute that there is no change in the computation of the respective interests of income and principal under the formula set forth in *Matter of Chapal, supra*, and *Matter of Otis, supra*. It is contended by said sponsors that the new section merely releases income to the life tenant but does not increase the ultimate amount payable to the respective interests on the ultimate sale of the property. With this contention appellant does not agree. The bases for his disagreement are set forth in Point II of this

brief. The equality of the statutory rule with the Chapal-Otis Rule is more of appearance than of fact. There is equality where the proceeds of sale are sufficient to reimburse all of the advances made out of principal and to leave a surplus. However, when the sponsors of the legislation contend, upon which contention the legislature presumably relied, that there is equality, they overlook the fact that such a result will not apply in every instance. Keeping abreast of economic conditions, the court will recognize the fact that because of depressed values, high assessed valuations with resulting excessive taxes, requirements of the multiple dwelling law of New York and "a buyers' market", mortgagees are often unable to collect anything on their mortgages and in many instances property has been abandoned because of the impossibility of procuring from the property even the cost to make the same legally tenantable. It must be further borne in mind that the statute does not limit its provisions to first mortgages, but applies as well to subordinate mortgage liens and the history of these in the City of New York is too well known to require further comment.

Application of the statute guarantees all net income to the life tenant except to the extent such income exceeds 3%, not of the value of the property, but of the face amount of a mortgage which no longer exists. All loss is taken from principal even to the extent that no portion of the 3% can be reclaimed should the completion of the salvage operation show that the aggregate of the payments to income exceeds the amount to which income, as a joint venturer, was entitled.

As stated by Loughran, *J.*, in his dissenting opinion below (R. 128):

> "The crux of the prevailing opinion is this striking sentence: 'A statutory rule of adminis-

tration which requires the trustee to apportion income in accordance with a fixed standard which in the exercise of administrative discretion the trustee would even without the statute have power to adopt does not, in our opinion, constitute a taking of property.' I cannot assent to so free an appraisal of the retroactive mandate of the Legislature.

No authority is cited to show that it was always open to trustees of their own motion to pay net income to a life tenant at such a 'fixed standard', in peremptory disregard of the recoupment rights of remaindermen. Indeed, the general understanding of the profession appears to have been the other way, seeing that the Surrogates who devised the statute have vouchsafed us one reason alone for its enactment, viz., 'Trustees have hesitated to pay such net income because in the case of overpayment to the life tenant, the trustee might be surcharged with that amount.' (See L. 1946, p. 1182.)

This recognition by trustees of the conflicting rights of remaindermen was not without justification. It is true that hitherto a trustee for a life tenant and remaindermen was entitled to distribute surplus income in his discretion. (*Matter of Otis*, 276 N. Y. 101, 115.) But that discretion was always to be exercised by a trustee with reasonable judgment and with an even hand between the life tenant (fol. 261) and the remaindermen in the particular circumstances. (See *Carrier* v. *Carrier*, 226 N. Y. 114, 125, 126; 28 Halsbury's Laws of England [1st ed.], 123, 124; 2 Scott on The Law of Trusts, Sec. 187; 4 Pomeroy on Equity Jurisprudence, [5th ed.] Sec. 1062a.) The retroactive provisions of the statute direct trustees instanter

to make final payment of net income to a life tenant not at a fixed rate merely, but at the expense of the remaindermen if need be. Hence I cannot accept the presupposition that the statute confers no new power upon trustees.

There is no occasion now for examination of the real nature of the equitable right of a trust beneficiary. At least the beneficiary owns the obligation of the trustee—a thing which is as truly the subject-matter of property as any physical object. (See Ames, Lectures on Legal History, p. 262. *Cf.* 1 Scott on The Law of Trusts, Sec. 130.) Consequently I see no warrant for the view that the respective interests of beneficiaries of a discretionary trust are not rights of property in the constitutional sense. (See *Pritchard* v. *Norton*, 106 U. S. 124, 132.)"

As hereinbefore stated, equitable powers rest with the Court and any argument that the legislature has done what the Court might have done under certain and proper conditions, overlooks the fact that the legislature and the judiciary are separate branches of government and that, whereas the courts may apply equity in a particular instance, on adjudicated facts, the legislature has no inherent power to adjudicate or establish rules of property and of law changing the pre-existing rights of property.

The fact, if such fact can be presumed, that in the instant case the statute might be reasonable in its provisions and work no hardship, is not an argument to support the validity of the statute. It is the duty of the courts to declare invalid an unconstitutional statute no matter how desirable or beneficial the attempted legislation may be. *16 Cor. Jur.* Sec. 92 and cases cited.

As said by the Court of Appeals in *City of Rochester* v. *West*, 164 N. Y. 510, 514:

> "The validity of a statute is not to be determined by what has been done in any particular instance, but by what may be done under it. (*Stuart* v. *Palmer*, 74 N. Y. 183; *Gilman* v. *Tucker*, 128 N. Y. 190, 200.) It is equally true that the validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end."

It may be that the life tenant is usually the primary object of testator's bounty but, as hereinbefore stated, the test of constitutionality is not to be determined from the effects in a particular case but upon the general purpose of a statute and its efficiency to effect that end. Since the enactment of Section 18, Decedent Estate Law, which deprived a testator or testatrix of the power to disinherit a surviving spouse, many instances have come to the attention of practitioners where the testator or testatrix is unhappily married or separated from his or her spouse and creates a life estate as a minimum compliance with the statute. It is reasonable to state that hardly a practicing attorney in the State of New York has failed, in the last ten years, to come in contact with a client who created a life estate for a surviving spouse at the same time hoping that he or she would never enjoy a penny of it. Every practicing attorney knows and every judge knows of at least one instance in his experience where a testator was more concerned about his remaindermen than he was about the life tenant. In none of these instances can it reasonably be maintained that the testator was primarily concerned with the life tenant.

Applying the test heretofore quoted from *City of Rochester v. West, supra*, the application of Section 17-c of the Personal Property Law would not comply with the wishes of the testator in the instances mentioned but would be absolutely in opposition to such wishes. It is for this reason that appellant stated *supra*, that there might be validity to the statute if it provided first for an adjudication of the intent of the testator, and if the Court should first adjudge the intent of the testator, which could be gleaned from his will, the facts surrounding the making of his will, his life or association with and regard or affection for the life tenant, then, upon the basis of such adjudication, the intent could be carried out by giving to the life tenant, the preference which the testator intended. The legislature had no right to create retroactively one catgory for all last wills and testaments which involve life estates.

POINT II.

The statute, in directing the ascertainment of net income on a fiscal year basis commencing with the anniversary date of acquisition of title, as construed by the decree appealed from, directing income payments at a specified rate and making said provisions retroactive, is unconstitutional.

As argued in Point I, the legislative branch of government has no power under the constitution to enact retroactive laws which deprive a person or persons of vested rights which have accrued under and pursuant to the law as it existed at the time the statute was enacted. The test of constitutionality is whether the statute results in deprivation of rights in any instance where the statute is applicable. To demonstrate simply that the applica-

tion of the statute results in deprivation of rights of remaindermen, we will compare the preexisting law with the statutory provisions. We will presume a set of facts to demonstrate how the application of the statute can result in such deprivation. As any language or reasoning of the author of this brief would be but a poor substitute, we will use the language of Mr. Surrogate Delehanty in *Matter of Wacht*, New York Law Journal, January 14th, 1942.

Concededly *Matter of Chapal, supra* (cited and followed in *Matter of Otis, supra*), fixed the pertinent law as it existed when the statute was enacted. In *Matter of Chapal* at page 472 a unanimous court (excepting O'Brien, J., not sitting) spoke through Loughran, J., as follows:

> "* * *. If the income of a particular parcel is more than sufficient to pay the carrying charges thereof, the trustees are hereby directed to exercise their own discretion and judgment with respect to distributing such surplus income entirely or to retaining the same or some part thereof to meet possible subsequent deficiencies. If such surplus exists in the case of a particular parcel as to which the trustees have theretofore taken or applied funds from the principal of the trust estate to pay deficiencies of income, the trustees are directed to reimburse the principal of the trust estate from such surplus income."

Section 17-c of the Personal Property Law, subdivisions 2 (a), (b) and (c) provide as follows:

> "(a) Net income during the salvage operation up to three percentum per annum upon the principal amount of the mortgage shall be paid to the life tenant, regardless of principal advances for the

expenses of foreclosure or of conveyance in lieu of foreclosure and arrears of taxes and other liens which occurred prior to such foreclosure or conveyance and the costs of all capital improvements. Any payment of net income heretofore or hereafter made to the life tenant up to such three percentum per annum shall be final and shall be not subject to recoupment from the life tenant or as a surcharge against the trustee or executor. The amount of all such payments shall be taken into account, however, in the apportionment of the proceeds of sale and shall be charged against the share of the life tenant.

(b) The foregoing principal advances shall be repaid out of excess net income above such three percentum per annum. When principal advances have been satisfied, any excess income shall be impounded (subject to reinvestment under the terms of the will or deed) to await sale and apportionment.

(c) The unpaid principal advances shall be a primary lien upon the proceeds of sale and shall be paid first out of any cash so derived. If insufficient the balance shall be a primary lien upon any purchase money mortgage received upon the sale."

We quote as follows from *Matter of Wacht, supra*:

"The statute says that the 'amount of all such payments (to income) shall be taken into account, however, in the apportionment of the proceeds of sale and shall be charged against the share of the life tenant.' This provision of the statute contemplates of course that there shall be in existence

a share of the life tenant in excess of the amount irrevocably paid. Where there is no share of the life tenant against which the payments can be charged the statutory rule for charge is a futility. An assumed state of facts respecting a first mortgage salvage operation will illustrate the vice of the statute even in the case of a prior lien. We will assume that a mortgage of $10,000 bearing interest at five per cent. is unprotected by the moratorium laws. On its due date all of the interest is paid up fully. The owner of the equity cannot pay the principal. On the mortgage due date a tax bill of $500 becomes due. The owner delivers a deed to the estate fiduciary in lieu of foreclosure and receives for it the sum of $500. The fiduciary thereupon pays the tax bill and begins the salvage operation. New money has been used to the extent of $1,000 and principal is then involved in the salvage operation to the extent of $11,000. There is no accrued and unpaid income due to income account at the beginning. During the salvage operation which lasts four years the net earnings per year are exactly $300. Since these earnings equal exactly the statutory rate to which the life tenant is entitled on the original principal sum of $10,000 the estate fiduciary pays the money over to income account. On the fourth anniversary of acquisition of the fee the fiduciary sells it for $7,000. He promptly reimburses principal for the $1,000 of new money which was advanced in the salvage operation. There is left in the fiduciary's hands $6,000 and he is obliged to apportion the salvage proceeds under the statute. He knows that principal now has a $10,000 interest and that income has a $2,000 interest computed by multi-

plying by 4 (the number of years of the salvage operation) the sum of $500 (the amount of interest at the mortgage rate to be credited to the income account). The denominator of the apportionment fraction is 12,000, the numerator for principal is 10,000 and that for income 2,000. Obviously principal takes five-sixths of the salvage proceeds and income one-sixth. The apportionable salvage proceeds consist of $7,000 received for the fee less $1,000 refunded for new advances, plus the $1,200 earned during administration. Thus the apportionable salvage proceeds are $7,200. Income is entitled to one-sixth, or $1,200, which is the precise amount that income had received during the operation. Principal is entitled to $6,000, which is the precise amount due it under the Chapal-Otis rule.

But what if the $7,000 sale price was gross and not net? If we vary the statement by assuming that the brokerage on the sale, the attorneys' fees and other expenses of sale used up $600, we then find that the net sale proceeds are $6,400. As before, principal account is paid $1,000 in refund of the new money. This leaves in the fiduciary's hands $5,400. Just as before, the fiduciary must make an apportionment between principal and income. The fractions of interest remain exactly the same, five-sixths and one-sixth. The fiduciary adds to the net sale proceeds after refund of new money —$5,400—the profits during operation—$1,200—and gets an apportionable total of $6,600. He takes five-sixths of this for principal account and finds that he should have in principal account $5,500. In fact the total in his hands is only $5,400. He knows of course that the missing $100 is in the hands of

the income beneficiary whose share of one-sixth of the salvage proceeds was only $1,100. Though the income beneficiary has been paid $1,200 under the statute the fiduciary cannot recover the excess payment of $100. The remaindermen will not be content to suffer such a loss.

It is a simple task to select many states of fact in salvage operations which produce like proof of the invalidity of the statute. One other example will be given. A salvage operation is undertaken in respect of a six per cent. first mortgage of $10,000. At the date of acquisition in foreclosure two years' interest is in default, as well as two years' taxes amounting to $1,200. The cost of foreclosure is $600. This amount plus the ampunt needed to pay the taxes aggregates $1,800 of new money which principal account must advance. After completing the foreclosure the trustee operates the property for eighteen months and has a net yearly return of $600. The operation produces $900 net during the eighteen months. If the statutory income share is to be computed ratably on a portion of a year, income would be entitled to have paid currently as earned the sum of $450 which is three per cent. per year on $10,000 for eighteen months. If, on the other hand, the statutory scheme of payment is to compel payment to income of the first money earned up to three per cent., then the $300 earned during the six months of the second year of operation would all be payable to income and thus income would get one-half of the first year's operation and all of the second year's operation, or a total of $600. On the assumption that the statutory rule provides for a ratable sharing of the income the amount paid to income is assumed

to be $450. On that assumption $450 is left as a balance of earnings during operation. This amount is credited upon the $1,800 of new moneys advanced and leaves a balance of $1,350 to be collected out of sale proceeds, if at all. On this state of facts income has an income credit in the salvage apportionment of $2,100—six per cent. on $10,000 for a total of three and one-half years. Principal for apportionment purposes has an interest of $10,000. The fraction for apportionment has the denominator 12,100. The numerator for principal account is 10,000 and for income account is 2,100.

The sale proceeds after deducting the immediate expenses of the sale are $2,750.00. The net proceeds of operation are $900.00. The gross salvage proceeds are $3,650.00. Against this total is to be charged the new capital advances of $1,800. This leaves a balance to apportion of $1,850.00. Out of the total sum to be apportioned there is to be paid to income account (21/121 x 1850) a total of $321.07. The balance payable to principal (100/121 x 1850) is $1,528.93.

On the assumption that the statutory rule for payment to income account required a payment of only $450.00 and on the assumption that income account is entitled on apportionment only to a total of $321.07 it is obvious that income has been *irretrievably overpaid* $128.93. The trustee receives in the course of the salvage operation the sale proceeds of $2,750.00 and the operation proceeds of $900.00, making a total of $3,650.00. He pays to income account under the statute prior to sale a total of $450.00. He refunds to principal account out of the proceeds of operation another $450.00. He pays the balance of new money due to principal

out of the sale proceeds and thus appropriates $1,350.00. The total of these three items is $2,250.00. Leaving in the hands of the trustee a balance of only $1,400.00.

Since principal (after full repayment of capital advances amounting to $1,800) is entitled to an apportioned share amounting to $1,528.93 it is obvious that it is short by $128.93—the *non-recoverable* overpayment to income.

In the operation as stated income received irrevocably under the statute a sum of $128.93 belonging to principal. If the statutory formula operates to give income the whole $300 which was earned during the six months of the second year of operation (rather than $150 thereof), then the overpayment to income is increased by $150 to $278.93.

The two salvage operations which have been supposed by the court show that the likelihood of a gross overpayment to income under the statute is very grave in any instance where only earnings during operation (as in the case of a junior lien) furnish the fund to be apportioned. These examples also show that only if the earnings during operation are so large as to make the statutory payments therefrom to income negligible or if the sale price is high or if income's participation in the salvage is very large or if some permutation of these factors exists which favors the statute will the rights of the parties under the statute agree with their rights under the settled law of the state declared in *Matter of Chapal* and *Matter of Otis* (*supra*). A statute with so many infirmities cannot be sustained.

If attempt be made to salvage the statute by saying that it is applicable only to those salvage

operations in which the combined sale and operation proceeds do furnish an interest payable to the life tenant in excess of the non-recoverable interim payments, the obvious answer is that the interim payments are ordered made when earned; and the ascertainment of the fact of an adequate participation by income is not only unknown but also unknowable at the time the statute requires the interim payments to be made."

CONCLUSION.

The order and decree appealed from, in so far as they apply the provisions of Subdivision "2" of Section 17-c Personal Property Law, should be reversed and said subdivision adjudged unconstitutional.

Respectfully submitted,

FRANCIS J. MAHONEY,
Counsel for Appellants.